TEO AH KHING

v.

YII CHEE MING

HIGH COURT SABAH & SARAWAK, KUCHING
CLEMENT SKINNER J
[SUIT NO: 22-09-2000-III(I)]
11 NOVEMBER 2005

CIVIL PROCEDURE: *Costs - Getting-up fee - Review of deputy registrar's award regarding quantum - Whether there was an error of principle - Novelty or complexity of issues raised - 'Value of subject litigated' - Getting-up fees for interlocutory application as opposed to getting-up for full trial*

This was an application by the defendant to review the decision of the learned Deputy Registrar ('the DP') on getting-up costs awarded to the defendant for succeeding in his interlocutory application to strike out the plaintiff's suit for libel. The DP had allowed a sum of RM8,000 as getting-up fees when taxing the defendant's bill of costs. The defendant had applied to be paid RM60,000 by way of getting-up but the DP taxed off RM52,000 from the sum claimed. The defendant objected to the taxation and requested the DP to review his award. The DP, after dealing with the grounds submitted by the defendant *ie*, that the DP had not sufficiently considered the novelty or complexity of the issues raised and 'the value of the subject litigated', dismissed the defendant's objections with no order as to costs. The DP also pointed out that the getting-up was being awarded in respect of an interlocutory application under O. 18 r. 19 of the Rules of the High Court 1980 ('the RHC') as opposed to a getting-up for a full trial, and therefore should be less than that of a case involving a full trial. Being dissatisfied, the defendant applied for a review of the DP's award under O. 59 r. 36(1) of the RHC, contending that he should have been awarded at least RM30,000, if not the RM60,000 that he sought.

Held (dismissing the application with costs):

(1) The application to review was only in respect of the quantum of costs for the getting-up. The law on the matter at hand is fairly well settled; it is that the quantum awarded by the taxing registrar should not be changed unless there was an

A error of principle on the part of the registrar in fixing the amount. In the instant case, from the reasons given by the DP, there was no error of principle on the part of the DP in awarding the sum of RM8,000 as getting-up fees. The reasoning of the DP when dealing with each of the grounds
B relied upon by the defendant could not be faulted. In the first place, the striking-out application was brought on pure points of pleading and practice, where the court was simply asked to decide whether the plaintiff had fallen foul of certain basic rules of pleading, and, if so, whether the omissions were fatal.
C In the second place, even if it could be argued that these points were relevant to a striking-out application, they were neither novel nor complex – they were merely demonstrative of the myriad circumstances or ways in which libel or defamation may be occasioned. Thirdly, the DP was right to
D say that it would be speculative and wrong to award getting-up fees based on damages that a plaintiff hoped to receive, especially when this was not even a case where the subject matter of the litigation possessed a value. Finally, the DP was quite right when he pointed out that he was assessing what
E should be paid as getting-up fees for an interlocutory application as opposed to getting-up for a full trial. (paras 14, 15, 17, 18 & 19)

Case(s) referred to:

F *JP Finance (M) Bhd v. Tanswan Brothers Enterprise Sdn Bhd & Ors [1994] 3 CLJ 318 HC **(foll)***

*Kerajaan Negeri Johore & Anor v. Adong Kuwau & Ors [2002] 4 CLJ 259 FC **(dist)***

*Union Insurance Malaysia Bhd v. Chan You Young [2003] 7 CLJ 50 **(dist)***

G **Legislation referred to:**

Rules of the High Court 1980, O. 18 r. 19, O. 59 r. 36(1), O. 78 r. 3

For the plaintiff - Alvin Yong; M/s Tan Yap & Tang
For the defendant - Arthur Lee; M/s Arthur Lee Lin & Co

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Reported by Suresh Nathan

JUDGMENT

Clement Skinner J:

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[1] This is an application by Yii Chee Ming who is the defendant in this suit (hereafter 'the defendant'), to review the learned deputy registrar's decision on getting-up costs awarded to

the defendant for succeeding in his interlocutory application to strike out the plaintiff's suit. The deputy registrar had on 1 September 2004 when taxing the defendant's bill of costs, allowed a sum of RM8,000 as getting-up fees. The defendant had applied to be paid RM60,000 by way of getting-up but the deputy registrar taxed off RM52,000 from the sum claimed. Being unhappy with the award of RM8,000 as getting-up fees, the defendant objected to the taxation and requested the deputy registrar to review his award. On 2 February 2005 the deputy registrar sat to review his award but refused to revise it and dismissed the defendant's objections with no order as to costs.

[2] Being dissatisfied, the defendant has applied for a review of the deputy registrar's award under O. 59 r. 36(1) of the Rules of the High Court 1980 ('RHC'). It is the applicant's case that he should have been awarded at least RM30,000 if not the RM60,000 sought by him.

[3] The brief facts leading up to this application are these.

[4] The defendant had caused his lawyers to write a letter to one Mr. Teo Ah Khing (hereafter 'the plaintiff') demanding the repayment of a sum of B$310,000 allegedly lent to the plaintiff sometime on 21 December 1996. The plaintiff was informed that if repayment of the sum demanded was not made within seven days, legal proceedings would be commenced against him.

[5] The plaintiff felt he had been defamed by the defendant's lawyer's letter. Accordingly, on 25 January 2000 the plaintiff commenced this action in the High Court at Kuching, claiming damages for libel allegedly contained in the defendant's lawyer's letter of demand.

[6] The defendant then brought an application to strike out the plaintiff's writ of summons and statement of claim under O. 18 r. 19 RHC. By his application to strike out the defendant attacked the pleadings of the plaintiff, complaining that (a) the plaintiff had not complied with O. 78 r. 3 RHC, in that, the plaintiff had pleaded an innuendo but contrary to the requirements of the aforementioned rule, had failed to give particulars of the facts and matters on which he (the plaintiff) relied on in respect of the innuendo pleaded; and (b) the plaintiff had not pleaded all the material facts necessary to disclose a cause of action against the

defendant. As an alternative ground, the defendant also complained that the plaintiff's pleadings did not disclose a cause of action in libel because it was never pleaded that the alleged libel had been published to anyone.

[7] The defendant's strike out application was heard by the learned deputy registrar who, on 19 April 2001, allowed the application with costs and ordered the plaintiff's action to be struck out. The plaintiff appealed to the judge in chambers against the decision of the deputy registrar. On 13 July 2001 the learned judge allowed the plaintiff's appeal with costs 'both here and below', reversed the deputy registrar's decision and ordered that the plaintiff amend his statement of claim to reflect that he no longer relied on an innuendo as part of his pleaded case.

[8] Being dissatisfied with the decision of the learned judge, the defendant appealed to the Court of Appeal which, on 24 February 2004 allowed the appeal with costs, reversed the decision of the learned judge and restored the decision of the deputy registrar. It is only in respect of the costs awarded before the deputy registrar and the learned judge that this review is sought. The defendant has taxed his costs for the proceedings before the Court of Appeal and was awarded RM15,000 as getting-up fees there.

[9] When the defendant requested the deputy registrar to review his own decision on the quantum of getting-up fees allowed, the defendant had done so on the following grounds:

(i) the registrar had not sufficiently considered the decision in *Union Insurance Malaysia Bhd v. Chan You Young* [2003] 7 CLJ 50 where the High Court allowed a sum of RM200,000 as getting-up fees;

(ii) the registrar had not sufficiently considered the decision in *Kerajaan Negeri Johore & Anor v. Adong bin Kuwau & Ors* [2002] 4 CLJ 259 where the Federal Court confirmed the decision of the taxing registrar in awarding RM40,000 as getting-up fees;

(iii) the registrar had not sufficiently considered that as the plaintiff had chosen to file his action in the High Court, he expected to be awarded at least RM250,000 by way of damages. On that basis, the defendant contended that the registrar ought

to have taken into account 'the value of the subject litigated' and the importance thereof to the litigating parties and awarded a higher amount for getting-up because if it had not been so important, the plaintiff would have commenced proceedings in the Subordinate Courts.

[10] The deputy registrar gave reasons for refusing to revise his award of RM8,000 for getting-up. With regard to the defendant's first ground, the deputy registrar said that he had considered the decision in *Union Insurance Malaysia Bhd v. Chan You Young*, but he found the facts of that case clearly distinguishable from the facts of this case. The deputy registrar pointed out that in that case issues were raised which had never been raised before in Malaysia; that the issue in that case, namely, the 'inter-spouse' issue was therefore a novel and new issue. However, in the present case the deputy registrar found that the law on striking our applications as well as the law of defamation in Malaysia is reasonably clear and straight forward. He did not see any issue of novelty or complexity raised in the instant case.

[11] With regard to the defendant's second ground, the deputy registrar again said that he found the facts in the case of *Kerajaan Negeri Johore & Anor v. Adong bin Kuwau & Ors* distinguishable from the facts of this case, in that, there the respondents had actually asked for RM2.6 million as getting-up fees but was only awarded RM40,000 at the Federal Court stage of appeal, because even though the issue regarding the rights of the aboriginal people was a novel one, it was not complex. The deputy registrar pointed out that in this case the issue raised was not novel. He also said it would be wrong to inflate the getting-up fees by tying it to a formula which took into account a certain percentage or proportion of the amount in dispute or the amount of damages awarded to a party, which is what counsel in *Kerajaan Negeri Johore & Anor v. Adong bin Kuwau*, tried to do unsuccessfully.

[12] With regard to the defendant's third ground, the deputy registrar said that it did not follow as a matter of course that merely because the plaintiff had commenced his action in the High Court, he would be awarded damages in excess of RM250,000 if successful, because the High Court has a discretion to award any amount by way of damages. If that be the case the deputy registrar said it would be purely speculative to try to award getting-up fees based on damages which the plaintiff hoped to receive.

[13] The deputy registrar also pointed out that in this case the getting-up fees was being awarded in respect of an O. 18 r. 19 interlocutory application as opposed to a getting-up for a full trial, and therefore should be less than that of a case involving a full trial. In support he relied on the decision of VC George J, in *JP Finance (M) Bhd v. Tanswan Brothers Enterprise Sdn Bhd & Ors* [1994] 3 CLJ 318.

[14] Reverting to the issue at hand, it is quite clear to me that the application to review is only in respect of the quantum of the costs for the getting-up. The law on the matter at hand is fairly well settled; it is that the quantum awarded by the taxing registrar should not be changed unless there was an error of principle on the part of the registrar in fixing the amount. See *Kerajaan Negeri Johore & Anor v. Adong bin Kuwau & Ors* [2002] 4 CLJ 259.

[15] So, the question is: Was there an error of principle on the part of the deputy registrar in awarding the sum of RM8,000 as getting-up fees in this case? From the reasons given by the deputy registrar, I don't think there was any and neither has it been demonstrated to me that there was. I do not think the reasoning of the deputy registrar when dealing with each of the grounds relied on by the defendant can be faulted and neither do they reveal an error of principle. Each case will always have to be considered on its merits and the circumstances disclosed. As far as the two cases which were relied on by the defendant are concerned, the deputy registrar was correct when he said that these cases were clearly distinguishable from this case in so far as the issues raised in them were concerned, which could reasonably be regarded as breaking 'new ground' so to speak. I agree with what he said. I think it would be wrong to look at what was awarded in those cases as any measure of guidance for a getting-up fee in this case where the issues and law are so completely different and arising in different circumstances as well.

[16] No doubt the striking out application arose in the context of a defamation suit, but as far as the novelty and complexity of the issues raised in the striking out application are concerned, it can be seen that the plaintiff's pleadings were attacked on fairly straightforward grounds of pleading and practice, namely, whether or not sufficient facts and particulars had been pleaded to (a) support a plea of innuendo, (b) disclose a cause of action, and (c) establish that the alleged libel had been published to a third party

so as to sustain a cause of action in libel. In my judgment there is nothing novel or complex about these points of pleading and practice. But counsel for the defendant tried to argue that the striking out application had raised points of novelty and complexity, in that, the libel was alleged to have been contained in a letter of demand which was written not by the defendant himself but by his lawyer and transmitted to the plaintiff's branch office at Kuching. Accordingly, counsel for the defendant submitted that these facts gave rise to the following novel points of law which required examination of complex and undefined areas in the law of defamation:

(a) Can there be publication if a letter is sent by fax transmission to the plaintiff and received by members of his staff?

(b) Can publication of a legal demand amount to defamation?

(c) Is the lawyer who makes a defamatory demand protected by absolute privilege?

[17] With respect, I do not agree with the submission of counsel. In the first place, the striking out application was brought on pure points of pleading and practice, where the court was simply asked to decide whether the plaintiff had fallen foul of certain basic rules of pleading, and, if so, whether the omissions were fatal. In the second place, even if it can be argued that these points were relevant to a striking out application, I do not think they were novel or complex – they are merely demonstrative of the myriad circumstances or ways in which libel or defamation may be occasioned.

[18] With regard to the defendant's third ground, I find the deputy registrar was right to say that it would be speculative and wrong to award getting-up fees based on damages which a plaintiff hoped to receive. I just do not see how the defendant hoped to persuade the deputy registrar with his arguments on this third ground when this is not even a case where the subject matter of the litigation possessed a value.

[19] Finally, the deputy registrar was quite right when he pointed out that he was here assessing what should be paid as getting-up fees for an interlocutory application as opposed to getting-up for a full trial. As pointed out by VC George J, in the *Tanswan Brothers Enterprise* case, getting-up fees for an interlocutory

A application would normally be less than that for a full trial. In this regard it must not be overlooked that in the two cases relied on by the defendant, both went to full trial, and so the getting-up fess there were assessed on that basis, although in the *Union Insurance Malaysia Bhd* case, the trial was on agreed facts.

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[20] For all the reasons above, I dismiss this application with costs.

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